United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-5015

To Be Argued By:
GEORGE FRIEDMAN ESQ.

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter of

ROBERT K. GOLDEN, Bankrupt

ROBERT K. GOLDEN,

Plaintiff-Appellant,

against

RENEE GOLDEN,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS

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On Appeal from the United States District Court for the Southern District of New York

QUESTIONS PRESENTED

1. Is a contractual penalty, as opposed to one imposed by a sovereign, dischargeable under the Bankruptcy Act?

2. Should that portion of Appellant's debt to Appellee, his former wife, which represents an additional $5.00 per day payment required only during a period of default pursuant to the terms of a written agreement be deemed a penalty and thus dischargeable under the Bankruptcy Act?

3. Should that portion of Appellant's debt to Appellee, which represents an additional $35.00 per week payment required after default and designated as "revived alimony" pursuant to the terms of a written agreement be deemed a penalty and thus dischargeable under the Bankruptcy Act?

STATEMENT OF CASE

The within appeal is from an Opinion-Order of Hon. Edward Weinfeld, U. S. D. J. entered on February 26, 1976 whereby an Order of the Bankruptcy Court dismissing Appellant's complaint was affirmed.

The said complaint sought a Judgment of the Bankruptcy Court declaring certain portions of an Order and Judgment of the Family Court of the State of New York to be dischargeable.

At the trial before the Bankruptcy Court the only evidence adduced was that the parties were married in 1956; there is one child of that marriage; the parties were divorced in 1961; and copies of an agreement, dated March 1, 1968 and a Judgment of the Family Court dated December 17, 1974 were introduced into evidence. There was no other testimony or evidence.

It is to be noted that the transcript of the minutes of said trial, as appears from the Clerk's Certificate filed herein, is missing.

The Bankruptcy Court found that while part of the debt appeared to be a penalty, imposed at the rate of $5.00 per day and totalling $8,960.00, it held, nevertheless, that such penalties are not dischargeable.

The Bankruptcy Court also found that the portion of the debt represented as "revived alimony", in the amount of $9,060.00 was in fact alimony and also not dischargeable.

On appeal before the District Court it was held that both portions of the debt were in the nature of alimony, support or maintenance and thus not dischargeable.

STATEMENT OF FACTS

The parties hereto were husband and wife between the years 1956 to 1961. There is a child of the marriage. Upon their separation and divorce there were various Court proceedings and agreements respecting alimony and support to be paid by Appellant, all of which culminated in the agreement dated March 1, 1968, (Appendix, p. 16a), which was annexed to Defendant's answer and introduced into evidence as Plaintiff's Exhibit "1" at the trial herein on May 1, 1975.

That agreement reflects that there had been a prior agreement respecting such support and alimony and various Court orders and judgments. The prior agreement was cancelled (Appendix, p. 18a), all claims by Appellee for past and future alimony were cancelled and waived (Appendix, p. 18a) and the prior Court order awarding support for the son in the amount of $50.00 per week (see Appendix, p. 18a) was superceded by a new provision whereby Appellant was required to pay from $220.00 to $300.00 per month (Appendix, p. 20a) dependent upon circumstances. The agreement also acknowledged arrears due and owing in the amount of $12,126.00 (Appendix, p. 20a), and makes various provisions for the

payment thereof (Appendix, pp. 21a-23a).

The agreement further provides for certain relief in the event Appellant might default in any of the provisions of the agreement.

Subsequent thereto, it was alleged that Appellant had defaulted and proceedings on account thereof were instituted in the Family Court which ultimately resulted in the Order and Judgment of December 17, 1974 (Appendix, p. 33a). That Judgment awarded the following sums to Appellee based upon the default provisions of the agreement, in addition to such sums as were otherwise due on account of arrearages and agreed upon support payments:

> $8,960.00 pursuant to Paragraph FOURTH D.4. (Appendix, p. 24a), that being the additional payment of $5.00 per day provision;
>
> $9,060.00 pursuant to Paragraph FOURTH D.5.b (Appendix, p. 25a), that being the "revival of alimony" of $35.00 per week provision.

Although the judgment awards a total of $35,086 against Appellant, the foregoing two items are the only ones contested in this proceeding. The balance of the sums due pursuant to the Order and Judgment and the prospective

payments for support of the infant are not being contested.

It is to be noted that the Order and Judgment includes the sum of $12,126.00 which was owing as of the date of the execution of the agreement and the sum of $4,940.00 which represents the arrears of agreed support at the rate of $260.00 per month (to be increased to $300.00 when the son begins college). It was the Appellant's failure to pay those sums which gave rise to the obligation to pay the additional sums of $35.00 per week to Appellee personally and another $5.00 per day. The additional sums amount to a total of $70.00 per week or approximately $303.00 per month over and above that which had been agreed upon as reasonable and necessary for support.

It is to be further noted that the Family Court Order and Judgment was not based upon some demonstration by Appellee that the initial provisions for support set forth in the agreement were inadequate or insufficient. It was based upon the bankrupt's failure to comply with the support provisions of the agreement, it being held that such failure gave rise to the additional obligations which are contested herein. Thus,

if the Appellant-Bankrupt had sufficient assets to pay the sum of $17,066.00 (that being the total of $12,126.00 owed Appellee-Defendant pursuant to the agreement and $4,940.00 owed as child support pursuant to the agreement) he would still, nevertheless, be indebted to Appellee for an additional $18,020.00. Furthermore, even though the Appellant is paying current support pursuant to the agreement at the rate of $260.00 per month, and is making payments on account of the arrears so that Appellee will eventually be made whole he would still be required by the Order and Judgment to pay an additional $35.00 per week to Appellee.

However, had there been no default the additional $18,020.00 would not be owing and would not have been paid nor would there be any continuing obligation to pay the extra $35.00 per week. In that perspective it is difficult to perceive how those additional sums can be determined to be in the true nature of alimony, support or maintenance.

It is Appellant's intentions to show, in Points I, II and III which follow, that the above sums are actually penalties and that same are dischargeable pursuant to the applicable provisions of the Bankruptcy Act.

POINT I

CONTRACTUAL PENALTIES ARE DISCHARGEABLE DEBTS

There do not appear to be any cases standing for or against the above proposition and thus the question may well be one of first impression. However, a logical analysis of the Bankruptcy Act can lead to but one conclusion, to wit, that a penalty provision of a contract between private parties is a debt which may be discharged.

The Bankruptcy Court, in reaching its decision after trial, concluded that even though the $5.00 per day default charge might be a penalty it is, nevertheless, not dischargeable. It is submitted that the Court erred in reaching such conclusion.

All provable debts of a bankrupt are dischargeable except for those specifically excluded from the operation of a discharge pursuant to Section 17a of the Bankruptcy Act. However, there has also evolved a series of cases which hold that certain penalties too are not dischargeable despite the fact that no express provision therefor is contained in the Bankruptcy Act. Thus, Appellee has cited on the appeal below the following cases:

In Re Thomashefsky, (C.C.A.) 51 F. 2d 1040

In Re Green, (W.D.N.Y.) 6 F. Supp. 1022

In Re Spagat, (.D.C.) 4 F. Supp. 926

Spalding -v- New York, 4 How. 21, 11 L. Ed. 858, 45 U.S. 21

People -v- Spalding, (N.Y. 1843) 10 Paige, 284

Rosevine Realty Corporation -v- Stich, 164 Misc. 339, 298 N.Y.S. 758, 760

In Re Dearborn Mfg. Corp., (D.C.) 18 F. Supp. 763

New Amsterdam Casualty Co. -v- McMahon, 196 Misc. 746, 93 N.Y.S. 2d 32, 33

However, those cases all relate to claims for a penalty or forfeiture which is, in fact, owing to the United States or to any State or any subdivision thereof or one who is a subrogee of one of the foregoing.

Those cases all stand for the proposition that although a sovereign's claim based on a penalty is not permitted to share in the distribution of assets of a bankrupt's estate, by virtue of its disallowance pursuant to Section 57j, the sovereign's claim should not be lost forever and thus the Courts have held them to be non-dischargeable. However, all of those cases deal only with claims which are not allowable under Section 57j.

It is well established that Section 57j "does not deal with penalties based on private agreements and promised by a debtor as a penalty for his breach of contract, in addition to or in lieu of damages." Collier on Bankruptcy, 14th Edition, ¶57.22, p. 382; See also cases cited at note 4, pages 382-383. Thus, there is no authority for the proposition that a private contractual penalty is nondischargeable and such debts are, therefore, provable under Section 63 of the Act and dischargeable under Section 17.

It is clear that the debts involved in this proceeding are the result of a private agreement and if the Court concludes that they are penalties then the inescapable result is that they are also dischargeable.

POINT II

THAT PORTION OF THE SUBJECT DEBT WHICH IS ATTRIBUTABLE TO A FIVE DOLLAR PER DAY CHARGE DURING DEFAULT IS A PENALTY

It is axiomatic that the Bankruptcy Court has the jurisdiction to look behind the judgment of another Court in order that it determine the dischargeability of particular debts. See Davison -v- Caldwell, 115 F. 2d 189; In re Abramson, et al, 210 Fed. 878 (2d Cir. 1914); Cf. Pepper -v- Litton, 308 U.S. 295 (1935). Thus, despite the fact that the Family Court has affixed any particular appelation to a debt, this Court may look to the actual transaction to determine the true nature of the debt. Paragraph FOURTHD.4, (Appendix, p. 24a) simply and succinctly states that upon default of ten days duration the bankrupt shall pay the sum of $5.00 per day until termination of the default. It does not state to whom or for whose benefit that money is to be paid, nor does it specify for what purpose the money shall be used. It can only be concluded that this obligation is imposed as an incentive to the bankrupt not to default, is in addition to his obligation for past due and

prospective support and, thus, it is clearly in the nature of liquidated damages or penal in character.

A fair reading of that provision of the agreement, even in the context of all the surrounding circumstances, can lead only to the conclusion that it is a penalty. That word has been described, in another context, by Judge Leonard Hand as follows:

> In substance an obligation is penal when its amount is measured neither by the obligee's loss, nor by the valuation placed by him upon what he has given in exchange.

In re Caponigri, (D.C.N.Y.) 193 Fed. 291.

There is no indication of any kind whatsoever in the agreement that this additional charge is a measure of some additional support for the son or former wife nor is there any indication that it is in replacement of something given up. It is clearly something extra to be paid by Appellant because of his failure to comply with the other provisions of the agreement and is, therefore, penal in nature.

Bankruptcy Judge Roy Babitt stated, in his opinion after trial, in interpreting this clause:

> In the event of the bankrupt's default in any payments, the agreement provided that he would be charged a penalty of $5.00 per

day for every day payment was late ... (Emphasis added) (Appendix, p.45a)

The learned Bankruptcy Judge went on to state that

> ...it is possible to read this part of the judgment as being in the nature of a penalty for the bankrupt's failure to perform his obligation under the agreement. (Appendix, p. 49a)

His conclusion that if this was, in fact, a penalty it would, nevertheless, not be dischargeable was erroneously based on the line of cases discussed at Point I hereof.

District Judge Edward Weinfeld, in affirming Bankruptcy Judge Babitt on appeal, did not treat the question of dischargeability of private contractual penalties by virtue of his conclusion that the debt is not penal in nature but rather a part of Appellant's marital duty of support. Thelearned Judge was able to reach that decision by finding that the Court could directvariable rather than constant fixed payments.

It is respectfully submitted that Judge Weinfeld erred in reaching such conclusion, on several grounds.

Initially, this Court must take cognizance of Bankruptcy Rule 810, the successor to former General

Order 47. The Rule requires that the District Court "shall accept the referee's findings of fact unless they are clearly erroneous ...". See In re Gibraltor Amusements Ltd., 291 F. 2d 22 (2d cir.), cert. denied, 368 U.S. 925 (1961).

As indicated above, Bankruptcy Judge Babitt found that the $5.00 per day provision was a penalty or was in the nature of a penalty. Thus, District Judge Weinfeld was bound to accept that conclusion.

It is also to be noted that Judge Weinfeld's finding that the Family Court could fix a variable payment (Appendix, pg. 62a) merely accepts the Family Court Order and Judgment without looking into the facts upon which same was made. While Appellant must concede that a Court could fix variable payments dependent upon the circumstances, eg., increased or decreased earnings of one of the parties, the fact is that same is clearly not the case with respect to this contested provision of the agreement.

Where variable payments were contemplated the parties clearly identifed same. Thus, the agreement provides for Appellant to pay $220.00 per month until the child entered high school when the payments would be

increased to $260.00 per month and then further increased to $300.00 per month when he enters college. (Appendix, p. 20a). The parties also comtemplated some variable payments dependent upon Appellant's gross income exceeding $20,000.00 per year (see Appendix, p. 21a). However, the subject default clause is not related to support in any way, is not related to the needs of Appellee or the child nor is it related to Appellant's ability to pay. It is only a penalty.

In this regard Judge Weinfeld failed to take note of the fact that the additional $5.00 per day is not set aside for Appellee or the child and that is one more element which must only lead to the conclusion that such payments were not intended for support nor were they intended to be in partial discharge of any matrimonial obligation.

POINT III

THAT PORTION OF THE SUBJECT DEBT WHICH IS ATTRIBUTABLE TO "REVIVED ALIMONY" AT THIRTY FIVE DOLLARS PER WEEK IS A PENALTY

Much of what has been discussed at Point II of this brief is also applicable to Appellant's contention that the "revived alimony" is also a penalty. Perhaps Appellant's burden in this regard is slightly more difficult because the agreement used the word "alimony" and if that were determined to be an accurate description there would be no question about the dischargeability thereof.

Paragraph FOURTH D.5.b. (Appendix, pg. 25a) of the agreement is clothed in terms of "alimony" and "revival of alimony" in the event of a default of more than thirty days duration. The mere fact that it is called "alimony" does not mean that is what it actually is. Whether a debt is for support of a wife depends on its essential nature rather than the form in which it is garbed. Krupp -v- Felter, 77 N.Y.S. 2d 665. The so-called "alimony" in this case does not replace that which the bankrupt defaulted in providing but is, rather, in addition thereto; it is not geared to the Appellee's

needs and her own lack of ability to provide therefor; it is not related to the bankrupt's ability to pay. The "alimony" in this case is simply another contractual attempt to give the bankrupt an incentive to comply with the other terms of the agreement and is, therefore, also in the nature of liquidated damages or penal in character. A simple contractual debt by any other name, whether it be called alimony or support, does not lose its essential character and is not transmuted into that which it is not. This "alimony" provision is not related to the supply of necessaries, is not the equivalent of support and is, therefore, a mere contractual debt which is dischargeable.

It is patently clear that the Congress in specifying that obligations for alimony, support and maintenance are not dischargeable was enunciating a public policy which, perhaps, has its roots in the desire of the sovereign to avoid the obligation it would otherwise have to replace, by its own payments, such alimony, support and maintenance. Thus, the Congress did not except from dischargeability any and all obligations running from a husband to his wife and children but rather only those which are in the nature of support.

There has grown a series of cases which differentiate between the husband's nondischargeable obligation for support and his dischargeable obligation vis-a-vis "property rights". See e.g.:

Hylek -v- Hylek, 53 F. Supp. 657, aff'd 148 F. 2d 300

In Re Avery, 114 F. 2d 768

Tropp -v- Tropp, 129 Cal. app. 62, 18 Pac. 2d 385, 27 Am. R. (N.S.) 230

Fife -v- Fife, 1 Utah 2d 281, 265 Pac. 2d 642

The fact is that the Bankruptcy Act does not mention any such dichotomy nor does it refer to "property rights" but rather makes clear that everything other than an obligation for actual alimony, support or maintenance is dischargeable.

That is the only determination to be made and since these debts are clearly in addition to the alimony and support provisions provided for in the agreement (and which Appellant acknowledges and is currently paying) this Court must conclude that such debts are dischargeable.

CONCLUSION

THE ORDER APPEALED FROM
SHOULD BE REVERSED.

Respectfully submitted,

GEORGE FRIEDMAN

Services of three (3) copies of

the within is

hereby admitted this 26 day

of APRIL, 1976

Sellers, Ks. & Black

Attorney for